

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

Houston, Texas

RR& B EVENTS, LLC d/b/a
TEXAS HAWKERS, INC. AND
ARAMARK, INC., JOINT EMPLOYERS 1/

Employer

and

Case No. 16-RC-10223

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 100, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:2/

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 3/
3. The labor organization involved claims to represent certain employees of the Employer. 4/

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. 5/
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All vendors, fillers, cashiers, expeditors employed by RR & B Events, LLC, d/b/a Texas Hawkers, Inc. at Enron Field and the Astrodome in Houston, Texas.

EXCLUDED: All office clerical, guards, concession workers, room managers, floor managers, and supervisors as defined in the Act.

DIRECTION OF ELECTION6/

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who

have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Service Employees International Union, Local 100, AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list containing the full names and addresses of all eligible voters which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); and *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 16 Resident Office, Mickey Leland Federal Office Building, 1919 Smith Street, Suite 1545, Houston, Texas 77002, on or before June 13, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570.

This request must be received by the Board in Washington by June 20, 2000.

DATED June 6, 2000, at Fort Worth, Texas.

/s/ Martha Kinard

Martha Kinard, Acting Regional Director
NLRB Region 16

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1. At the hearing, the Petitioner took the position that RR & B Events, LLC d/b/a Texas Hawkers, Inc., herein the Employer, and Aramark Sports and Entertainment Services of Texas, Inc., herein Aramark, are joint employers of the unit employees described in the petition. Both the Employer and Aramark took the position that although there was a contractual relationship between them, this relationship did not create a joint employer status. The record evidence does not establish the Employer and Aramark constitute a joint employer for the purposes of this proceeding. To establish joint employer status, there must be a showing that two or more business entities share or codetermine those matters governing the essential terms and conditions of employment. *Martiki Coal Corp.*, 315 NLRB 476, 477 (1994), *Flav-O-Rich, Inc.*, 309 NLRB 262, 264-265 (1992). Further, there must be a showing that “the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction”. *Flavo-O-Rich, Inc.*, 309 NLRB at 264 *quoting Laerco Transportation*, 269 NLRB 324, 325 (1984).

Aramark is an employer contracted to provide food and beverage services, concession and operations, and retail merchandise for events that take place at sports venues such as Enron Field and the Astrodome. Both of these venues are located in Houston, Texas and are the two venues involved with this proceeding. Aramark has offices at both Enron Field and the Astrodome. The Employer does not have any on-site offices at these locations.

The Employer has a subcontract with Aramark in which the Employer agrees to provide all stadium vending services for baseball games and other events in seating areas located on the main and upper concourses at Enron Field and the Astrodome. As a result, Aramark does not engage in food and beverage vending operations in the seating area at either stadium. Although the parties have not yet executed the contract, the record reflects that both Aramark and the Employer adhere to its provisions. Aramark designates the food and beverage products the Employer will sell and provides these products to the Employer at the stadiums. Aramark provides the Employer vending

rooms at the respective stadiums to facilitate the sale of these products. Aramark is the licensee for alcoholic beverages sold by the Employer and, as such, is required by law to ensure that beer sales are in compliance with state liquor laws.

Under the terms of the contract, the Employer is required to reimburse Aramark for any taxes paid on behalf of any of its employees and is financially responsible for any on-the-job injuries suffered by its vendors. Additionally, the Employer is responsible for ensuring that all vendors maintain Aramark policies regarding standards of service, wearing uniforms correctly, properly serving customers, adhering to alcohol beverage policies, and following Enron Field rules and regulations. Aramark may terminate its contract with the Employer if the Employer's vendors violate any rules pertaining to alcohol beverage policies. Aramark may also require vendors provided by the Employer to undergo a background check. Aramark is not involved either directly or indirectly with the hiring of any of the Employer's employees.

The record reflects that no one in the Employer's management hierarchy supervises the employment of any Aramark employees. The Employer, as a policy, encourages vendors, cashiers, expeditors, and fillers to be pleasant and cooperative in any of their interactions with Aramark personnel but there is no record evidence of the Employer disciplining or directing Aramark employees. The record reflects that employees of the Employer do not interact with Aramark management representatives on a regular basis. Vendors are required by the Employer to comply with certain Aramark directives, primarily not selling products on the concourse, not placing product trays on the concourse and not selling liquor products to minors.

Aramark and the Employer do not share any common directors, owners or managerial or supervisory personnel. Division Manager of Concessions Scott McGinn and Enron Field General Manager Martin Price represent Aramark in communications with the Employer. McGinn and Martin, as well as other Aramark representatives, have been instructed to limit their contact with the Employer to Enron Field Manager Maureen Edwards. Occasionally, Aramark management representatives will directly instruct vendors and other employees of the Employer to not sell their products in the concourse.

Regarding discipline, the record reflects one incident in April 2000 where Aramark Regional Vice President Mark Williams admonished a vendor for passing out literature at Enron Field. One vendor testified that he observed an unnamed Aramark management representative tell the Employer to discharge a vendor in 1999 for violating Aramark's alcoholic beverage policies. The record reflects other instances in 2000 where unnamed Aramark representatives threatened vendors with discharge for violating stadium rules or Aramark directives relating to sales on the concourse. In one incident in February 2000, two vendors were suspended by the Employer for the duration of a rodeo event at the Astrodome pursuant to a safety issue brought to the Employer's attention by Aramark representatives. Aside from these incidents of admonitions and threats, the record does not reveal that any employees of the Employer have been suspended, discharged or disciplined by Aramark representatives.

It is undisputed that all employees of the Employer's vending operations at Enron Field and the Astrodome are paid solely by the Employer. Aramark does not directly or indirectly handle any of the Employer's scheduling, work assignments, or recordkeeping. Aside from record evidence that Aramark pays the air fare to the Employer's top producing vendors to Major League Baseball's All Star Game, the record reflects that the Employer is the entity that distributes all applicable benefits to all its employees. Employees of the Employer, along with other personnel working at either the Enron Field or the Astrodome, pay a discounted price for their food if and when they choose to eat at the respective cafeterias operated by Aramark at these stadiums. Aramark also makes parking available for all stadium personnel at a discounted price. The record reflects some employees of the Employer make other parking arrangements.

The Employer determines the overall number of vendors needed for events at Enron Field based on the length of the baseball series and the time of the week. The record reflects that representatives from both employers occasionally conduct informal meetings to discuss stadium and Aramark rules that apply to the Employer's vendors. In these informal meetings, Aramark representatives point out safety and alcohol policy violations to the Employer and the Employer determines what action, if any, is needed. Both Aramark and the Employer post various notices that are directed to their respective employees. One vendor testified that he saw notices from Aramark General Manager Price posted and stacked on tables in a vending room. The record does not reflect any instances of Aramark distributing these notices directly to the Employer's employees.

The record evidence is insufficient to establish a joint employer finding. The record reflects that Aramark and the Employer do not participate in the interviewing, hiring, or training of each other's employees. There is a reference in the record to Aramark reserving the right under its contract to conduct background checks on the Employer's vendors. The record is devoid, however, of any instances where Aramark either engaged in these activities or prevented the Employer from allowing a particular vendor to work at Enron Field or the Astrodome. Additionally, the record clearly shows that payroll, work assignment, scheduling, and recordkeeping responsibilities for vendor, cashier, expediter and filler employees are solely handled by the Employer and it is the Employer who determines how and when these employees are paid.

The record does not reflect that Aramark or the Employer supervises each other's employees on a regular and substantial basis. The record demonstrates that employees of the Employer rarely interact with Aramark management personnel. The record evidence does reveal, however, that the Employer, under its contract with Aramark, is responsible for ensuring that its employees abide by certain Aramark directives. The record reflects these directives are limited to those addressing stadium safety or Aramark's legal obligations to ensure that alcohol beverage laws are being observed and are not directly associated with how and when the Employer's employees perform their job duties.

The record does reflect instances of Aramark management representatives directing the Employer's vendors to certain areas of the stadium. These occasions, however, are isolated and limited in most cases to Aramark directing vendors off the concourses and

back to the seating areas they are supposed to vend. Further, these directions are consistent with Aramark's concerns regarding overall stadium safety and, in almost every instance, do not involve Aramark supervising these employees regarding how they sell their food and beverage products. There is also record evidence that representatives from Aramark and the Employer meet to discuss the rules applicable to vendors. These meetings are informal and infrequent and typically involve discussions associated with compliance with general Enron Field stadium rules.

Most importantly, the record reflects that Aramark and the Employer do not participate in disciplining of each other's employees. The record does not reflect any specific instances where Aramark management has suspended, discharged, or otherwise disciplined any employees of the Employer. Although there is evidence that Aramark has threatened employees with discharge, there is no evidence that either Aramark or the Employer has acted on these threats. Moreover, the record reveals that in many cases, Aramark merely informs the Employer of transgressions its management representatives have observed, leaving the handling of any necessary discipline to the Employer.

Based on the foregoing, I find that Aramark does not control the essential terms and conditions of employment of the Employer's employees. *Martiki Coal Corp.*, 315 NLRB at 477-488, *Flav-O-Rich, Inc.*, 309 NLRB at 264-265. Accordingly, I find the Employer and Aramark do not constitute a joint employer with respect to the employees described in the petition.

2. The Employer, Aramark and the Petitioner filed briefs which were duly considered.
3. The parties stipulated, and I find, that the Employer is a Texas corporation engaged in the provision of sales services at sporting events. During the past 12 months, a representative period, the Employer has provided services valued in excess of \$50,000 for Aramark, an enterprise within the State of Texas. The parties further stipulated, and I find, that Aramark is a Texas corporation engaged in the provision of food service. During the past 12 months, a representative period, Aramark has purchased and received at its Houston, Texas, facility, goods valued in excess of \$50,000 directly from points outside the State of Texas.
4. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
5. The Employer and the Petitioner stipulated, and the record supports, that all fillers, cashiers, and expeditors employed by the Employer to work at Enron Field should be included in the unit. It is not disputed in the record that fillers, cashiers and expeditors work closely together in vending rooms at Enron Field and share a community of interest in the performance of their vending operation duties. Petitioner also seeks to represent all vendors who provide vending services for the Employer at Enron Field and all vendors, fillers, cashiers, and expeditors who work for the Employer at the Astrodome. The Employer contends that all vendors are independent contractors and should be excluded from the unit and takes the position that fillers, cashiers, or expeditors working at the Astrodome should not be included in the unit described herein. There are

approximately ninety-three employees in the unit sought by the Petitioner and approximately twenty-four in the unit urged by the Employer.

Kenneth Readhimer, Stephanie Readhimer and Maureen Edwards are the owners of the Employer. Kenneth Readhimer is responsible for handling sales and marketing for the Employer and Edwards is Manager at Enron Field and is responsible for managing all day to day vending operations. Kelly Smith is Assistant Manager at Enron Field and reports directly to Edwards. Floor Managers Tony Brannon and Robert Wester and five room managers also report to Edwards. Floor managers are responsible for walking between vending rooms located on one of two stadium levels at Enron Field. Floor managers oversee all vending operations, including addressing disciplinary problems, assisting the cashier in the vending rooms, and retrieving product from the warehouse. All of the management representatives who work for the Employer at the Astrodome also work in the same position and perform the same duties for the Employer at Enron Field.

There are four vending rooms at Enron Field, two on the lower concourse and two on the upper concourse. Room managers are responsible for supervising the cashier, expediter, and filler employees who work in the vending rooms and have authority to discipline these employees. At the hearing, the Employer and the Petitioner stipulated, and I find, that the manager, assistant manager, room managers and floor managers employed by the Employer have authority to discipline and responsibly direct the employees of the Employer and are supervisors as defined by Section 2(11) of the Act.

There are four cashiers, four expediters and sixteen fillers employed by the Employer to work in the vending rooms and approximately sixty-nine vendors who provide vending services at Enron Field. The record reflects the Employer employs the same vending operations at the Astrodome as it does at Enron Field. All of the cashiers, expediters, and fillers who work for the Employer at the Astrodome work in the same position and perform the same vending duties at Enron Field.

Vending Operations

Vending operations essentially begin when vending room employees arrive at Enron Field for a baseball game. Vendors notify the Employer of the games they will be able to work by marking a list created by the Employer for an upcoming baseball series at the stadium. Upon their arrival, vendors pick up assignment forms from one of the Employer's managers at a check-in table. These forms state the product vendors will sell at a respective game and the section of the stadium they are to sell the product. Vendors then proceed to one of four assigned vending rooms located on either the lower or upper concourse. Each vending room has a room manager, a cashier, an expediter, and three to five fillers. Room managers are responsible for overseeing vending room operations and ensuring that the cashiers, expediters, and fillers are performing their jobs. Room managers are ultimately responsible for the cash and the product that is exchanged between cashier, expediter, and vendor employees.

Upon arrival in the vending room, vendors provide their assignment sheets to the cashier. The cashier is responsible for managing the money that is received and given to vendors. Upon receiving individual assignment sheets, the cashier prepares receipts and gives these receipts to the respective vendors. The vendors take the receipts to the room manager who in turn allows the vendors to pick up a load of product. Facilitating this process are expeditors. Expeditors are responsible for ensuring that food and beverage products obtained after the first load are properly paid for by the vendor and properly passed on to vendors and make sure sufficient product is given to vendors. Fillers are responsible for stocking the product bins so there is product available for the vendors. Fillers also clean the vending room and dispose of vending room trash.

The product sold by vendors is limited to food and beverage products such as beer, water, peanuts, cotton candy, and sodas. These products are placed in trays and bags provided by the Employer and given to vendors to sell in the stands. When vendors have sold the product in their trays, they return to the vending room for another load. Vendors use the money made from product sales to get receipts from the cashier for new loads of product. Vendors repeat this process throughout the event they are working. At the end of the event, vendors return any unsold product and pay the cashier the money from their last product sales. Depending on the length of the lines formed by other vendors trying to reload their trays, vendors spend approximately twenty to thirty-five percent of their time in the vending room. Vendors are not permitted to buy food or beverages from any concession stands during the games and are not allowed to take home any free souvenirs offered to fans attending a particular game.

Accounting associated with an event's proceeds is completed after the event is over. The Employer relies on Aramark to perform the accounting necessary to calculate total sales and commission due to the Employer. After all money is collected from all of the cashiers, representatives from Aramark and the Employer go over the cash receipts. The numbers from the cash receipts are placed in a computer located in Aramark's Enron Field office and the commission owed to the Employer is calculated. A commission check is not issued to the Employer until after a respective home stand has been completed or after a ten-day period. The Employer is responsible for any accounting necessary to pay the vendors their commission shares.

Vendors at Enron Field

All vendors operate under a contract labor agreement they execute with the Employer. Under this agreement, vendors are responsible for the proceeds associated with product sales made during the course of events, including the proceeds from the first load of product provided to the vendors by the Employer. Vendors are responsible for all cash transactions during any given event, including being subject to discipline for cash shortages. The agreement also provides that vendors are responsible for maintaining a sales average of \$250. When executing their respective contract labor agreements, vendors are provided with a handout that enumerates numerous vending policies and procedures of the Employer. The record reflects that similar policies and procedures are applied by the Employer to employees at the Astrodome. The record also reflects that the

Employer enforces these policies and procedures. In April 2000, Manager Edwards issued one vendor a disciplinary write-up for soliciting and passing out literature at Enron Field. In late April 2000, Floor Manager Brannon required two vendors turn in their uniforms and told them they were fired.

Vendors are assigned by the Employer to certain areas of the Enron Field stadium for every event. Vending assignments are based on vendor attendance and sales production. The record reflects that in unique circumstances, vendors may have product assignments changed. Vendors are subject to discipline if they do not vend in their assigned areas. On occasion, vendors will be asked by the Employer to sell in areas different from their assignment. One vendor was suspended for two days in 1998 for not vending in his assigned area and has been repeatedly told by a supervisor of the Employer he would be subject to discipline if he did not go to his assigned area. Vendors are not permitted to sell their products in the concourse area.

The record reflects there are instances when management representatives of the Employer such as floor managers will observe vendors as they are working in the stands. In some cases, "spotters" who are employed by Aramark as alcohol compliance officers will observe vendors who are selling alcoholic beverages to customers in the seating area. Vendors are not allowed to sit in the seating area and are not allowed to smoke, eat, or drink in this area. If another vendor is already present in a particular stadium aisle, vendors are instructed by the Employer to move on to another aisle within their assigned area. When selling their products, vendors establish their own selling style and techniques to encourage customers to buy their products. Vendors are not permitted by the Employer to solicit or insinuate tips. When necessary, vendors will attempt to resolve customer complaints or handle hostile confrontations with fans. If vendors are unable to resolve these conflicts, they will seek assistance from floor or room managers or stadium security.

Vendors are not permitted to leave an event early unless authorized by the Employer in advance of the event. If a vendor is unable to work a specific shift, the vendor is required by the Employer to contact a supervisor. If a vendor does not show up for a game as scheduled, that vendor is subject to disciplinary action by the Employer. The record reflects that vendors have some discretion as to when they arrive or leave an event or when they choose to vend for particular events. One vendor testified that vendors are only allowed to leave as early as the eighth inning of a baseball game if there is no more of their assigned product left in their assigned vending room. This vendor also testified that when he attempted to leave during the eighth inning of a particular ballgame, he was instructed by the Employer to stay. Another vendor testified that he left in the eighth inning of a game before all of his assigned product had been sold from his assigned vending room. The record does not reflect any vendor being disciplined for either arriving late or leaving an event early or for missing an event.

Although the Employer provides vendors with credit for their first load of product, vendors are responsible for having sufficient cash available with the first load to provide change to customers as needed. Vendors must reimburse the Employer for the credit

extended for the first load of product at the end of the event. Vendors are responsible for all money they receive from the sale of their products. Vendors are not allowed any cash shortages of any amount and are subject to disciplinary action by the Employer, including discharge, if they are short on cash at the end of an event. Except in extreme cases, vendors are financially responsible for products they obtain from their respective vending rooms.

The Employer pays the vendors every two weeks on a sales commission basis. Vendors do not punch a timeclock and are not restricted from working for other employers. The record reflects that some vendors work directly for Aramark as employees and the Employer as well as other employers. Occasionally, for some events outside of Enron Field or the Astrodome, vendors are requested by the Employer to provide vending services. One vendor testified the Employer paid him an hourly rate for providing vending services for an event at Enron Field in 2000 but had him complete a 1099 tax form for the amounts paid to him for the event.

Regarding hiring procedures, the Employer requires applicants to complete job applications and other employment eligibility forms such as Immigration I-9 forms. Vendors at Enron Field and the Astrodome attend meetings held by the Employer. These meetings may be mandatory, especially before a rodeo event. The Employer does not provide or pay for any vendor-related training. Vendors who wish to sell alcoholic beverages at either Enron Field or the Astrodome are required to obtain a license from the Texas Alcoholic Beverage Commission.

Unlike cashiers, expeditors, and fillers, vendors do not receive any vacation, sick pay, or medical benefits from the Employer. Vendors, unlike other employees, are required to pay their own payroll taxes and are responsible for obtaining and paying for their own disability insurance. Vendors are eligible for an attendance bonus paid by the Employer. This bonus can be up to one percent of a vendor's sales production. Vendors are also eligible to receive bonuses for referring new vendors to the Employer. These bonuses are predicated upon the sales the referred vendor earns over a defined time frame.

All vendors are required to wear uniforms designated by the Employer. The uniform consists of a hat with Aramark's name on it and a red shirt that says "Aramark Staff". Vendors also wear aprons provided by the Employer but there is no message on them. Vendors pay a deposit of \$44 for the uniform when beginning work for the Employer and this amount is taken out of their first paycheck. Vendors also have identification badges with Aramark's name on top and the Employer's name on the bottom and badges that identify the price of the products the vendors are selling. Vendors not wearing their uniforms are subject to discipline by the Employer.

The Employer first started providing vending services under contract for Aramark in 1995 for events at the Astrodome. At that time, the Employer was known as Readhimer Staffing Services. In early 1999, Readhimer Staffing Services changed its operating structure and was renamed Texas Hawkers, Inc. Beginning in 1999, the Employer began requiring vendors sign contract labor agreements. The record also reflects that prior to

1999 and while operating as Readhimer Staffing Services, the Employer did not treat vendors as independent contractors. The record also reflects there were no significant changes to the Employer's vending operations as a result of the transition.

The question of whether a individual is an independent contractor or an employee within the meaning of Section 2(3) of the Act is determined by using the common law "right of control" test, i.e.; whether the party for whom the service is performed has the right to control the "manner and means" of performance or whether that party is concerned only with the final result. *Diamond L. Transportation, Inc.*, 310 NLRB 630, 631 (1993).

The record evidence does not establish that vendors are independent contractors as defined by the Act. The evidence is clear that the Employer requires vendors to execute contract labor agreements that state vendors will be treated as subcontractors. Notwithstanding this agreement, the record shows that the Employer treats vendors as employees. With regard to the establishment of this relationship, the record reflects that when soliciting individuals to work as vendors, the Employer has prospective vendors fill out paperwork indicative of the Employer's intent to treat them as employees. The Employer requires vendors to complete job applications and other employment eligibility forms such as Immigration I-9 forms. These are all strong indicators of the establishment of an employee-employer relationship.

The record also shows that the Employer provides vendors comprehensive instruction concerning vending policies and procedures when these vendors are asked to execute their contract labor agreement. These instructions are replete with direction as to where, how, and when vendors may perform their vending duties. More importantly, the work rules detailed in the handout demonstrates that the Employer retains extensive control over the means by which vendors sell the food and beverage products provided to them. Although there is evidence in the record showing that vendors exercise some discretion as to what selling style and techniques they may use to assist them with product sales, this evidence does not outweigh the evidence that the Employer determines exactly what product a respective vendor sells, where vendors are allowed to sell their products, and what procedures vendors are to follow. In addition to providing the product, the Employer also provides vendors their trays, tubs, and bags. These items are the sole pieces of equipment the vendors require to sell products to customers in the stands.

In addition to promulgating extensive work rules for vendors to follow, the evidence reveals numerous examples of the Employer enforcing these rules with the vendors. In one instance in April 2000, Manager Edwards issued a vendor a disciplinary write-up for soliciting and passing out literature at Enron Field. In yet another instance, the Employer suspended a vendor for two days in 1998 for not vending in his assigned area. In February 2000, two vendors were suspended by the Employer for the duration of a rodeo event at the Astrodome after violating the Employer's safety rules. All of these incidents, along with floor managers' responsibility of patrolling the stadium levels vendors are working, are all strongly reflective of the Employer's exercise of supervisory authority over vendors on a day-to-day basis.

Lastly, when analyzing whether a party is an independent contractor, the degree of “entrepreneurial risk” undertaken by the party performing the service is a factor to examine. *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968). *See also, e.g., Central Transport, Inc.*, 299 NLRB 5 (1990); *Precision-Bulk Transport, Inc.*, 279 NLRB 437 (1986); *Don Bass Trucking, Inc.*, 275 NLRB 1172 (1985). The record does not reflect that vendors hire and pay their own employees at their own discretion to perform vending duties at either Enron Field or the Astrodome. Moreover, the record is clear that aside from having money available for making change during initial sales, vendors do not make any capital expenditures in association with their vending duties. Although vendors exercise some control over how much money they make, the degree of control exercised by the Employer over their work limits and minimizes the extent of entrepreneurial initiative vendors are permitted to exercise. Such control and direction over the manner and means vendors use to perform their jobs are indicia of employee status rather than entrepreneurial status. *See, e.g., Roadway Package System, Inc.*, 326 NLRB No. 72 (1998).

In its brief, the Employer relies on *A. S. Abell Publishing Co.*, 270 NLRB 1200 (1984) in support of its contention that vendors must be excluded from any unit found appropriate herein. The facts in this case are distinguishable from those in *Abell*. In *Abell*, the hawkers had discretion regarding where they located themselves for newspaper sales. In the instant case, the record is clear that vendors are assigned to specific areas of the stadium and in fact are subject to discipline if they refuse to vend in their assigned areas. In *Abell*, most of the hawkers’ activities were not directly supervised or even observed by any officials of the employer. In the instant case, the vendors, unlike the hawkers in *Abell*, are subject to discipline if they do not following vending policies and procedures promulgated by the Employer. Further, there are floor managers employed by the Employer whose specific duties are to oversee all aspects of the Employer’s vending operations, including those associated with the vendors. Additionally, unlike the hawkers in *Abell*, vendors are not required to purchase all of their products from the outset with their own money. In *Abell*, hawkers were required by the Employer to purchase the newspapers from their own funds. Lastly, in *Abell*, there were no dress codes and hawkers did not wear employer insignia. Vendors in the instant matter are required by the Employer to wear uniforms when they are vending in the seating areas.

Based on the above and the record as a whole, I find that vendors are employees rather than independent contractors within the meaning of Section 2(3) of the Act. Although there is record evidence that the Employer does not withdraw taxes from vendor paychecks and that vendors exercise some discretion regarding selling techniques, this evidence does not outweigh the evidence of the Employer’s exercise of extensive control over its employment relationship with the vendors or the evidence that the Employer has acted on that relationship by directing and disciplining vendor employees.

Finally, the foregoing evidence demonstrates that vendors should be included in any unit found appropriate herein. Based on the duties they perform at respective events at Enron and the Astrodome, the record shows that vendors are fully and functionally integrated with the cashiers, expeditors, and fillers in the vending operations at both stadiums. *See,*

e.g., St. Francis Hospital Medical Center, 223 NLRB 1451 (1976). Specifically, vendors are required to interact with cashiers for each event they work when cash and receipts are exchanged. Likewise, vendors are required to interact with fillers and expeditors when they need to obtain more products to sell. These employees perform supporting and ancillary functions that allow vendors to perform their jobs. Accordingly, I find that vendors are properly included in the unit found appropriate herein.

Vending Operations at the Astrodome

A unit consisting of employees at a single-plant or store location is presumptively an appropriate unit unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity. *D&L Transportation, Inc.*, 324 NLRB 160 (1997); *J&L Plate, Inc.*, 310 NLRB 429 (1993); *Bowie Hall Trucking*, 290 NLRB 41, 42 (1988). To determine whether the presumption has been rebutted, the Board looks at such factors as centralized control over daily labor operations and labor relations, extent of autonomy in the local manager to handle the facility's day-to-day ordinary operations and to supervise the employees' day-to-day work, similarity of skills, functions and working conditions, extent of employee interchange, geographic proximity, and bargaining history, if any. *D&L Transportation, Inc.*, 324 NLRB at 160.

The record reflects the Employer employs the same vending operations at the Astrodome and Enron Field. Additionally, all of the managers, floor managers, room managers, vendors, cashiers, expeditors, and fillers who currently work events for the Employer at the Astrodome hold the same positions and perform the same vending duties for the Employer at Enron Field. As such, in addition to utilizing the same skills to perform their vending room duties, the employees at both stadiums enjoy the same high degree of interchange with each when performing these job functions. The record further reflects that the Employer employs the same management structures and applies the same terms and conditions of employment to employees at both stadiums. Hence, the control over daily labor operations at both stadiums is highly centralized by the Employer. Lastly, both stadiums are located in the same city and are within reasonable proximity of each other.

Based on the evidence reflecting that employees at both stadiums enjoy a high degree of interchange with each other, perform the same duties, and are directed and supervised by the same supervisors and managers, I find that the presumptive appropriateness of the petitioned-for, single-facility unit has been rebutted and that the Astrodome facility is properly included with the Enron Field location in the petitioned-for unit found appropriate herein.

6. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

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